

Nos. 82-1349 and 82-1350

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,
v. *Petitioner,*

S.A. EMPRESA DE VIACAO AEREA RIO GRANDENSE,
Respondent.

UNITED STATES OF AMERICA,
v. *Petitioner,*

EMMA ROSA MASCHER, *et al.,*
Respondents.

UNITED STATES OF AMERICA,
v. *Petitioner,*

UNITED SCOTTISH INSURANCE Co., *et al.,*
Respondents.

On Writs of Certiorari to the United States
Court of Appeals for the Ninth Circuit

**SUPPLEMENTAL BRIEF FOR RESPONDENT
VARIG AIRLINES**

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January 24, 1984

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Respondent S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines) (hereinafter "VARIG") submits this brief in response to questions from the Court during oral argument to which counsel for United Scottish Insurance Co., *et al.* ("UNITED SCOTTISH"), Mr. Rich-

ard F. Gerry, gave answers not in accord with VARIG's position. Following is VARIG's position on each of the issues raised.¹

ARGUMENT

1. Negligence of the FAA and the VARIG Crash

During oral argument the following exchange occurred between the Court and Mr. Gerry concerning the time span between the negligence of the Federal Aviation Administration ("FAA") and the VARIG crash, and whether there was a repetition of the FAA's negligence, first committed during the type certification process, at the time the Airworthiness Certificate was issued:

QUESTION: In the Scottish case that you are just referring to, what was the time span between the FAA inspection and the accident?

MR. GERRY: About two and a half years, from 1965 to 1968.

QUESTION: The Scottish case?

MR. GERRY: In the Scottish case.

QUESTION: I thought that was the time on the other case.

MR. GERRY: No, the other case was from 1958 at the time of the issuance of the original type certificate for the Boeing 707 and 1968, the time of the—1973, the time of the accident, 15 years in that case.

QUESTION: When do you think the negligence occurred in the Varig case?

MR. GERRY: In the Varig case, in the original type certification, Your Honor—

QUESTION: There was not a repetition of that negligence when the plane was given an Airworthiness Certificate?

MR. GERRY: Your Honor—

¹ VARIG is a Brazilian corporation having no known subsidiaries, affiliates or parent corporations. See Supreme Court Rule 28.1.

QUESTION: I just want yes or no.

MR. GERRY: No is the answer.

Transcript of Proceedings before the Supreme Court (January 18, 1984), at 26-27.

Both of Mr. Gerry's answers are incorrect. As pointed out in Brief for Respondent Varig Airlines, at 10'n.10, the Type Certificate for the Boeing 707-300C series, the model aircraft involved in the VARIG crash, was issued on April 30, 1963. The Airworthiness Certificate for the accident aircraft was issued in 1968 (Joint Appendix ("J.A.") 60). It is VARIG's view that the FAA was negligent in 1958 when it issued a Type Certificate for the first 707 model. There was a repetition of that negligence in 1963 when the FAA issued a Type Certificate for the 707-300C series, and again in 1968 when it issued an Airworthiness Certificate for the accident aircraft. Thus, the time span between the FAA's negligence and the VARIG crash was five years (1968-1973), not fifteen.

2. Inspection of VARIG's 707 in Brazil

Mr. Gerry made the following misstatement regarding whether VARIG's 707 was subject to inspection in Brazil:

QUESTION: Were these aircraft subject to inspection in the countries to which the airline's purchaser is attached?

MR. GERRY: Yes, they were, Your Honor. . . .

Tr. at 26. This is incorrect. As stated in the uncontradicted affidavit of Frederico J. Ritter, when VARIG buys an aircraft manufactured in the United States such as the Boeing 707 accident aircraft which has been issued both a Type Certificate and an Airworthiness Certificate by the United States FAA, "the airline does not go behind these two certificates to review the documentation submitted by the manufacturer to show compliance with

regulations. *Neither does the Brazilian government when the aircraft is registered in Brasil.*" (Ritter Affidavit ¶ 3, J.A. 150) (emphasis added).

3. Delegation of Inspections by the FAA

VARIG disagrees with the following account given by Mr. Gerry with respect to the delegation of inspection activities to Designated Engineering Representatives ("DERs") employed by the manufacturer in the type certification of the Boeing 707:

QUESTION: Do you know whether or not the FAA ever delegates to the manufacturer the issuance of the type certificate?

....

MR. GERRY: They delegate some inspection activities to designated representatives. . . .

....

. . . At the time of the Varig aircraft certification there was not this delegation option. . . .

Tr. at 28-29.

Mr. Gerry's statement is incorrect. According to the deposition testimony of the FAA's employees (J.A. 137), the DER system was in existence at the time of the type certification of the Boeing 707 and DERs were used during that type certification process.

However, as pointed out in VARIG's Brief, at 36, *FAA employees* were required to verify that the manufacturer had complied with all of the applicable federal aviation regulations before issuing a Type Certificate. In the *Varig* case, the evidence is to the effect that neither the FAA nor anyone else *ever* inspected or viewed the design of the Boeing 707 lavatory trash container to verify compliance with CAR 4b.381(d), despite the fact that FAA employees had *no* discretion to "spot check" compliance with only *some* of the regulations. (See VARIG Brief at 15-16).

4. Discretionary Function and the *Dalehite* Case

During counsel for UNITED SCOTTISH's argument on the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a), the Court asked him whether the Court in *Dalehite v. United States*, 346 U.S. 15 (1953), had not found that "the decision as to how to bag fertilizer was discretionary." Tr. at 33. Mr. Gerry disagreed, and stated that "we are a long way from *Dalehite*." *Id.*

It is VARIG's position that the Ninth Circuit's ruling in *Varig* is consistent with *Dalehite* on this point. As the Court correctly noted, in *Dalehite* the Court did find that the government's decision on how to bag fertilizer came within the discretionary function exception to the Act. However, this finding turned upon the fact that the decision on how to bag the fertilizer, as well as other decisions in the manufacturing process held to be negligent by the district court, "were all responsibly made at a planning rather than operational level. . . ." 346 U.S. at 42. The Court found:

Each [of the acts] was in accordance with and done under, specifications and directions as to how the FGAN was produced at the plants. The basic 'Plan' was drafted by the office of the Field Director of Ammunition Plants in June, 1946, prior to beginning production

. . . Each of these acts looked upon as negligence was directed by this plan Bagging temperature was fixed. The type of bagging and the labeling thereof were also established. The PRP coating, too, was included in the specifications. The acts found to have been negligent were thus performed under the direction of a plan developed at a high level under a direct delegation of plan-making authority from the apex of the Executive Department.

Id. at 38-40 (emphasis added, footnotes omitted). *Dalehite* thus established that under the discretionary func-

tion exception "acts of subordinates in carrying out the operations of government *in accordance with official directions* cannot be actionable. *Id.* at 36 (emphasis added).

In the *Varig* case, the decision that the aircraft lavatory trash container should contain fire, as stated in CAR 4b.381(d), was no doubt made at the planning and policy level. Here, however, the analogy with *Dalehite* ends. In contrast to the government employees in *Dalehite*, the evidence is that *no* FAA employee *ever* inspected the lavatory to verify that it complied with the regulation. The responsible FAA employees simply failed to carry out a specific, mandatory regulation which they were supposed to enforce. The discretionary function exception to the Federal Tort Claims Act does not encompass the *failure* to carry out official directions as embodied in specific, mandatory agency regulations; and this Court's decision in *Dalehite* does not support such an interpretation. See VARIG Brief at 38-41.

CONCLUSION

For all of the reasons stated above, as well as the reasons stated in VARIG's brief on the merits, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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